

To: Jones, Jim[Jones.Jim@epa.gov]; Vaught, Laura[Vaught.Laura@epa.gov]; Distefano, Nichole[DiStefano.Nichole@epa.gov]
From: Black, Jonathan (Tom Udall)
Sent: Mon 2/3/2014 2:47:32 PM
Subject: You've probably seen...

I think it came out well:

Senators Launch New Effort To Clarify TSCA Bill's Preemption Provisions

Posted: January 30, 2014

Senate supporters of a bipartisan bill reforming the Toxic Substances Control Act (TSCA) are weighing several proposed amendments that they hope will eventually address concerns from Senate environment committee Chairman Barbara Boxer (D-CA) and other opponents who fear the current bill language will severely limit state toxics programs.

Sources say that among the ideas being discussed is new language clarifying that the bill would preserve state labeling laws like California's Prop. 65, but not necessarily regulatory programs, like the state's landmark green chemistry rules, which industry fears will create a patchwork of banned substances.

A state source says that in addition to the labeling issue, there has also been "talk" of measures to streamline waiver provisions states can use to preserve certain regulations and grandfathering provisions for existing state programs.

Another possible measure being discussed, the state source says, is one that would extend state authority until EPA renders a final action on a chemical, given concerns that it could be up to 10 years following a high priority designation before the agency is able to issue final action on a substance.

But the state source says that section 15 of the bill, which deals with preemption, "needs a lot of work" before some states will express support for the legislation, and that they would like to see the debate on preemption "shift" to establishing shared responsibility under a new TSCA regime between states and EPA, as is reflected in other environmental statutes like the Clean Water Act.

Sources familiar with the effort say it is aimed at reaching agreement with Boxer and other bill opponents, though so far, the new push for a deal, led by Sens. David Vitter (R-LA) and Tom Udall (D-NM), does not appear to have persuaded Boxer, who has said she will block passage of the bill until preemption and other provisions are addressed, or other Democratic opponents.

"Now is the time to move forward," with the legislation, Vitter said in a Jan. 24 statement to *Inside EPA*, adding that "We have been working very hard since the [bill] was introduced to improve the bill and are growing our strong bipartisan coalition with the momentum to reform the outdated unworkable Toxic Substance Control Act."

But a Democratic Senate aide says that "negotiations are ongoing but so far the concerns regarding preemption have not been addressed."

The renewed Senate negotiations over the preemption provisions come as several political and other factors are creating renewed uncertainty over the bill's prospects. Chief among them is the recent chemical spill in West Virginia, which highlighted deficiencies in EPA's authority to gather toxicity and other data on the estimated 62,000 chemicals that are grandfathered under current law. "It helps expose an area of TSCA that has gotten some attention" regarding the grandfathered chemicals and current testing requirements, one industry source says.

But environmentalists are citing the spill to highlight deficiencies in the Senate bill, saying it would still create a decade-long process before EPA could act. "In its current form, [the bill] would require EPA to go through as much as a decade of preliminary steps before it could start regulating additional chemicals" and that it would be difficult to obtain information even once the analysis was underway, Dan Rosenberg of the Natural Resources Defense Council (NRDC) said in a Jan. 15 blog post.

Rosenberg said the bill would prevent EPA from requiring testing of a chemical unless it has been classified as "high priority" which in many cases may be difficult without some additional testing -- due to the lack of available health for thousands of chemicals in commerce -- including 4-methylcyclohexane methanol (MCHM), one of the chemicals spilled in West Virginia, adding that the bill would "widely preempt" state action on high-priority and other chemicals.

In addition, Vitter recently announced that he is running for governor of the Pelican State in 2015, a move some say creates urgency for him to cut a deal though others say he may be reluctant to take positions that would undercut his gubernatorial bid.

House Legislation

House lawmakers are also poised to introduce a TSCA reform bill in the coming weeks that some sources say could offer approaches to address some of Boxer's concerns. But the House could also renew and intensify opposition to any reforms, given that a House energy committee staffer says it will have "some similarities" to the Senate bill.

Rep. John Shimkus (R-IL), chair of the House energy committee's environment panel, said last year that while he is crafting a bill to introduce in 2014, he hopes that senators will reach a deal that will allow its bipartisan reform bill to advance.

At issue is S. 1009, which marks a compromise between Vitter, the environment committee's ranking Republican, and the late Frank Lautenberg (D-NJ). The bill -- which has won more than a dozen cosponsors from each party -- seeks to address TSCA reform comprehensively, revising most of the law's current provisions. In its current form, it has won strong support from industry officials, who are rigorously advocating for strong preemption provisions to head off what they say is a patchwork of state chemical control regimes.

As one example, industry groups are citing the recently introduced Vermont state bill that would allow regulators to identify chemicals of concern and designate them as "high priority," barring them from use in children's products. If enacted, the bill will add to the patchwork of state regulations that highlight the need for speedy TSCA reform, an industry source says, adding that the bill's introduction is a "response to a lack of action on TSCA reform."

But most environmental groups and states have strongly criticized the Senate bill, saying it will not provide EPA with adequate authority to regulate chemical substances and preempts states.

Of special concern for Boxer and states are the bill's provisions preempting state programs, which California officials have warned would bar states from enforcing existing chemical regulations after EPA issues a safety determination and from imposing new restrictions on chemicals identified as "high-priority" by EPA at the time the agency publishes a schedule for assessing safety of the substance.

Supporters of S. 1009, however, counter that there is much misinformation about the bill's preemption and other provisions, and that it would not hinder the ability of state's to plan or respond to chemical releases, but rather would help in generating new information that could be shared with states to better understand potential spill risks.

Further, the bill contains language to exempt from preemption any state or local action adopted under any other federal statute or state law related to water or air quality and waste disposal, those sources say.

Preemption Provision

An initial round of talks in 2013 between Boxer and the bill's supporters broke down in part because they were unable to resolve their differences over the preemption and other provisions, sources say.

But now the senators or their staff are making a renewed attempt at reaching an agreement. "It sounds like they're working on an amendment of clarifying language -- there has been some discussion we might see something this quarter," the industry source

says, but adds "Boxer needs to be convinced -- it's not an easy task."

That source adds that environment committee Republicans are willing to make it clear that the bill would not impact labeling laws like Prop 65, but that there may be instances in which the preemption provisions could apply to certain consumer product uses of individual substances targeted in state programs like California's green chemistry regulations.

A second source says that Boxer has been most "insistent" on preserving Prop 65, noting that the program already has a successful record whereas the green chemistry program, which requires assessment of alternatives to toxic substances, is still largely untested.

Observers say Republicans have sought to make the case that the bill has limited preemption provisions that are specifically designed to address TSCA-like regulations issued by states to target individual substances, and that the bill would give states the power to petition EPA to designate a chemical as high priority.

The first source says that EPA officials have appeared to be more involved than previously in the discussions with lawmakers over S. 1009, which "could help" with addressing Boxer's concerns, since EPA is the implementing agency. "EPA's voice is critical to understanding what is achievable and what is not," that source says. -- *Bridget DiCosmo* (bdicosmo@iwpnews.com)
This e-mail address is being protected from spambots. You need JavaScript enabled to view it)